No. 483

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

DANIEL LUMBER COMPANY, ET AL., *Petitioners,*

v.

EMPRESAS HONDURENAS, S. A., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeal for the Fifth Circuit

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SUBJECT INDEX

	PAGE
OFFICIAL AND UNOFFICIAL REPORTS OF COURTS BELOW	2
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
A	7
B	18
CONCLUSION	42
CERTIFICATE OF SERVICE	43
APPENDIX A (Opinion of the Court of Appeals, Fifth Circuit)	45
APPENDIX B (Civil Code of the Republic of Honduras)	58
APPENDIX C (Revised Statutes of Maine, 1944, Chap. 88)	60

AUTHORITIES

Allen v. Hammond, 36 U.S. 63, 9 L. Ed. 633	11
Cuba Railroad Co. v. Crosby, 222 U.S. 473, 32 S. Ct. 132, 56 L. Ed. 274	13
Haydon v. Branson, 33 Ida. 368, 195 Pac. 545	25
Insurance Company of North America v. Guardiola, 129 U.S. 642, 9 Sup. Ct. Rep. 425, 32 L. Ed. 802	24
Liechti v. Roche, 198 F. 2d 174	16
Manufacturers' Nat. Bank v. Hollingsworth & Whitney Co., 106 Me. 326, 76 Atl. 880	25, 26, 29, 31
Mississippi River Logging Co. v. Robson, 69 F. 773, 16 C.C.A. 400	25, 29, 31
Olive & Stirnenberg v. Hester, 63 Tex. 190	22
Slater v. Mexican National Railroad Co., 194 U.S. 120, 24 S. Ct. Rep. 581, 48 L. Ed. 900	15

TEXTS

Corbin on Contracts	10, 11

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Daniel Lumber Company, J. W. Daniel, Charles H. Daniel and R. W. Daniel, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered September 3, 1954, affirming a judgment of the United States District Court, Western District of Texas, in favor of Respondent, Empresas Hondurenas, S. A., and the order of said Court overruling the motion for rehearing entered October 7, 1954, in Cause No. 14888, on the docket of said Court.

Official and Unofficial Reports of Courts Below

The opinion of the Court of Appeals is reported as DANIEL LUMBER COMPANY, J. W. DANIEL, CHARLES H. DANIEL AND R. W. DANIEL v. EMPRESAS HONDURENAS, S. A., 215 F. 2d 465, and is found as Appendix A to this petition.

No opinion was written or entered by the District Court.

Jurisdictional Statement

Jurisdiction to issue the writ requested is provided for in Title 28, U. S. CODE, Section 1254 (1).

Jurisdiction under the law and facts in this particular case is invoked under Rule 19(b) of the Revised Rules of this Court.

Petitioners urge that the Court of Appeals in affirming the judgment of the District Court has so far sanctioned a departure from accepted and usual course of judicial proceedings by a trial court as to call for supervision by the Supreme Court of the United States.

The judgment of the Court of Appeals was dated and entered September 3, 1954. Motion for rehearing in the Court of Appeals seasonably filed was overruled October 7, 1954.

Questions Presented for Review

A.

Under a contract requiring the petitioners to cut thirty million board feet of timber over a period of five years, payment to be made for six million board feet a year whether cut or not, is respondent entitled to recover for a

single year of such contract where the verdict of the jury found that there was not in existence the thirty million board feet of timber as contemplated by the contract at the time it was made, the contract thereby wanting in consideration, and respondent by its pleadings sought no recovery other than a recovery that could be had under the express terms and provisions of the contract?

B.

Was the Court of Appeals justified in holding testimony as to the timber actually cut by petitioners, fixed by the verdict of the jury at four million board feet, conceded to be hearsay by the Court of Appeals harmless where such testimony was the only testimony from which a finding could be made by the trial court, ignoring the verdict of the jury as to the timber cut by petitioners, that there was as much as six million board feet of timber in existence at the time the contract between the parties, providing for the cutting by petitioners of six million board feet of timber a year for a period of five years, was made, whereby respondent could be and was allowed a year's recovery under such contract?

Statement of the Case

The litigation concerns a contract between the parties under date of September 16, 1947, as corrected by a subsequent agreement dated September 30, 1947. (R. 68-77).

Under this contract the respondent undertook to sell the petitioners at least thirty million board feet of standing pine timber on a tract of land known as La Soledad in the Republic of Honduras, in that the contract was for an initial term of five years and obligated the petitioners to

pay for a minimum of six million board feet of lumber each year irrespective of whether timber in that amount was cut and converted into lumber or not.

Suit was brought on the express provisions of the contract, the respondent alleging a failure of the petitioners to account for timber actually cut and, subject to such accounting, a failure on their part to make payment for two years of their minimum obligation thereunder. (R. 2-18).

The petitioners answered that the respondent did not own the quantity of timber it had undertaken to sell and as contemplated by the contract, and that by an advance payment of $15,000 made at the time the contract was executed they had paid in excess of the amount of timber actually cut by them. They further answered that the contract was to be interpreted according to the laws of the Republic of Honduras. By separate allegations, the petitioners alleged that the contract was ineffectual as a contract under the laws of Honduras in that it related to rights in real property and had not been executed as a public document in accordance with certain specifically alleged provisions of the Civil Code of the Republic of Honduras. (R. 19-37; 52).

At the close of the evidence the petitioners filed a motion to dismiss respondent's suit and a motion for an instructed verdict, all on the ground that respondent had failed to plead and prove a cause of action and right of recovery under the laws of the Republic of Honduras. Both motions were overruled. (R. 1194-1207).

A jury, in answer to special issues, found that there was not thirty million board feet of standing pine timber on the land known as La Soledad at the time the parties contracted, and that it was the intention of the parties that their contract was to be considered and construed as a con-

tract under the laws of Honduras. There was also a finding that the petitioners had cut four million board feet of timber during their operations. (R. 1211-1217).

After verdict and before judgment the respondent was granted leave to file a trial amendment in support of the proof it had offered as to certain laws of the Republic of Honduras. (R. 1233-1236).

The trial court made Findings of Fact as to certain laws of the Republic of Honduras and the construction to be placed thereon, which included a finding as to the validity of the contract between the parties. On the basis of such Findings of Fact and the verdict of the jury judgment was entered for respondent allowing recovery of one year's minimum obligation under the contract. (R. 1237; 1239-1248).

Such Findings of Fact by the trial court are as follows:

I.

Articles 602 and 605 of the Civil Code of the Republic of Honduras provide in substance that trees constructively severed from the land, as by a contract providing for their cutting and processing into lumber, are movables and personal property and are not immovables or real property.

II.

Article 1348 of the Civil Code of the Republic of Honduras provides in substance that obligations of contracts have the force of the law and must be complied with irrespective of the form in which they are drawn or the method by which they are executed.

III.

Article 1552 of the Civil Code of the Republic of Honduras provides in substance that contracts are valid if they contain the following elements: consent of the parties, certainty of the object of the contract, the reason for the obligation, and consideration.

IV.

Article 1573 of the Civil Code of the Republic of Honduras provides in substance that the obligations of a contract must be complied with regardless of the form of the contract.

V.

Article 1574 of the Civil Code of the Republic of Honduras provides in substance for the compelling of the execution of a contract in form contemplated for the execution of public documents even though such contract has not been executed in such form.

VI.

Article 1576 of the Civil Code of the Republic of Honduras provides in substance that if the terms of a contract are clear and there is no doubt as to the intention of the parties, such contract is enforceable and will be enforced.

VII.

Articles 325, 326 and 338 of the Civil Procedure Code of the Republic of Honduras, relating to the translating of contracts into Spanish, the affixing of stamps on such contracts, the execution of such contracts before a Notary, are all matters purely procedural, and being only matters of procedure are in no wise necessary when a valid contract is being enforced in another country than the Republic of Honduras.

VIII.

The contract between Empresas Hondurenas, S. A., and Daniel Lumber Company, the subject matter of this suit, under the laws of the Republic of Honduras related to rights in personal property and did not relate to rights in real property.

IX.

The contract between Empresas Hondurenas, S. A., and Daniel Lumber Company, the subject matter of this suit, was a valid contract under the laws of the Republic of Honduras at the time of its execution and is now a valid contract under said laws.

Reasons for Granting the Writ

A.

The basis of the litigation between the parties is that of their written agreements of September 16, 1947, and September 30, 1947. The latter agreements simply modifies and corrects the third provision of the initial agreement as to certain terms of payment.

Substituting the names of the parties to read respondent and petitioners for First Party and Second Party, respectively, as they are otherwise designated in the agreements, the contract, in its essential provisions as to *consideration and certainty of object*, may be summarized in its own words as follows:

> "Respondent is the owner of the standing pine timber on the property known as La Soledad consisting of approximately 32,000 acres of land in the Republic of Honduras.

"Respondent agrees to sell the stumpage rights to said timber, that is to say, the right to sever said pine timber from the soil and convert the same into lumber. *Petitioners agree that they will cut and convert into lumber a minimum of six million board feet of lumber per year.*

"3. Petitioners agree to pay to respondent as a consideration for the sale of said stumpage rights at the general office of respondent in the Republic of Honduras $6.00 per thousand feet board measure on all lumber sold at a market price of less than $40.00 per thousand feet board measure. Petitioners agree to pay to respondent, as a consideration for the sale of such stumpage rights, on all lumber sold at a market price of $40.00 or more per thousand feet board measure, 15% of the market price of said lumber at Honduras port less the actual freight charges from petitioners' mill to said port, up to and including $60.00 per thousand board feet of said lumber, and on any market price exceeding $60.00 per thousand board feet 25% on that part of the market price for said lumber which is in excess of $60.00 per thousand board feet.

"4. Petitioners agree to pay respondent all sums due on all lumber actually sold at the end of each three months period during the terms of this contract at the rates hereinabove set out.

"However, *it is expressly agreed and stipulated that if in any year petitioners fail to cut and convert into lumber the minimum of six million board feet contemplated as the minimum obligation of petitioners under the terms of this contract, then and in that event petitioners shall pay to respondent $6.00 per thousand board feet on the deficit between the amount actually cut and converted into lumber and the six million board feet minimum;* balance on said deficit to be paid when such timber is cut and converted into lumber and actually sold at the rates hereinabove set out. Such payment of $6.00 per thousand board feet on said

deficit to be paid on the date of the first quarterly payment after the termination of the year.

"In consideration whereof respondent grants to petitioners the right to cut and convert into lumber, commonly called 'stumpage rights', the standing pine timber on said land for a period of five years from the date of execution of this contract *with the option in petitioners to continue this contract for an additional five years.*

"5. (4) *Petitioners shall only be released from their obligation to make the minimum payment of $6.00 per thousand board feet on any deficiency under 6,000,000 board feet measure per year in the event that operations are suspended by act of God or causes wholly beyond the control of petitioners,* it being stipulated *that petitioners will not be released from the obligation to make such minimum payment merely because operations become difficult or more expensive* but petitioners shall only be so released in the event petitioners are prevented from continuing operations as hereinabove set out." (R. 68-77) (Petitioners' emphasis).

The plaintiff acquired title to the standing pine timber on La Soledad from W. F. Coleman Industrial, S. A., through Ian Allen McNab who had acquired the same prior to the organization of respondent company. Mr. McNab was also president of respondent company. (R. 949-957; 126; 1075).

J. Ivy Beall testified that he was the manager of W. F. Coleman Industrial, S. A., and acted in that capacity at the time of the sale of the timber to Ian Allen McNab; that he had been familiar with the land known as La Soledad since 1926; that at the time of the sale to Mr. McNab there was not more than from four to six million feet of pine timber on the property, situated on a single pine ridge consisting of not more than 2200 acres, and that he so in-

formed Mr. McNab of such fact both before and after the sale to him. (R. 943; 970; 975, 1012-1014; 1016).

The sale to Mr. McNab took place in November, 1946. (R. 949).

Mr. Beall further testified that at the time the petitioners ceased their cutting operations there was between a million and a quarter and a million and a half board feet of pine timber remaining on La Soledad. (R. 980).

The object and subject-matter of the contract contemplated a sufficient quantity of standing pipe timber on the land known as La Soledad as would result in the manufacture of at least thirty million board feet of lumber over a period of five years. For the contract definitely imposed upon the petitioners in no uncertain terms the absolute obligation of paying for a minimum of thirty million board feet of lumber whether such amount, or any part thereof, was ever cut and manufactured into lumber or not.

The jury found that it was the intention of the parties that their contract was to be considered and construed as a contract under Honduras law. The jury also found that *"there was not"* thirty million board feet of standing pine timber on the land known as La Soledad *"immediately prior to the execution of the contract."*

The principles of law in question, aside from the applicability of Honduras law, are aptly illustrated by CORBIN ON CONTRACTS:

> "As the discussion of the modern law proceeds, it will be noted that there are several degrees and kinds of 'impossibilities', as that term has in fact been used. At one end of the category is the so-called absolute impossibility, sometimes called 'physical' impossibility,

based upon all human experience and applicable to all manner of men, whatever may be their wisdom, strength, or scientific training. 'All the king's horses and all the king's men cannot put Humpty Dumpty together again.' No one can go to the moon. Even the Creator was thought to be unable to make a two-year old colt in a minute. This kind of impossibility has sometimes been described as 'objective' impossibility. * * * Antecedent impossibility, in the objective, absolute sense stated above, of rendering a performance that is promised, prevents the promise from being enforcible as a contract. It prevents the existence of contract; no contractual duty arises. This may be explained on various grounds, as that the parties cannot be supposed to have meant what they said, in case the impossibility was known to them, or that they have entered into the transaction by mutual mistake." Vol. 6, Sections 1325 and 1326.

"If a contract for the purchase and sale of some specified thing is made after the thing has ceased to exist, the contract will ordinarily be rescinded and restitution in favor of the purchaser decreed. Also the non-existence of the thing is a defense in a suit by the seller for the purchase price or for damages." Vol. 3, Section 600.

Such principles are further illustrated by the case of ALLEN v. HAMMOND, 36 U.S. 63, 9 L. Ed. 633, in which Hammond sustained the loss of a ship through illegal capture by a Portuguese squadron. Allen by written agreement was employed to prosecute Hammond's claim against the government of Portugal. Eight days before the making of such agreement, and unknown to both parties, Hammond's claim had been recognized and allowed by Portugal. Suit was brought by Hammond for cancellation of the agreement. The decree granting such relief was affirmed.

"The equity of the complainant is so obvious that it is difficult to make it more clear by illustration. No case, perhaps, has occurred, or can be supposed, where the principle on which courts of equity give relief, is more strongly presented than in this case. The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which in ordinary cases is held sufficient for relief in equity, unite in favor of the appellee.

"Suppose a life estate in land be sold, and at the time of the sale the estate has terminated by the death of the person in whom the right vested, would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. In either case, would it not be gross injustice to enforce the payment of the consideration?

"If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?

"There are cases in which the parties enter into the contract under a material mistake as to the subject matter of it.

"In the first case the vendor intended to sell, and the vendee to purchase a subsisting title, but which, in fact, did not exist; and in the second, a horse was believed to be living but which was, in fact, dead.

"If in either of these cases the payment of the purchase money should be required, it would be a payment without the shadow of consideration, and no court of equity is believed ever to have sanctioned such a principle. And so in the case under consideration; if Hammond should be held liable to pay the demand of the appellant, it would be without consideration.
* * *

"In 1 Fonblanque's Equity, 114, it is laid down that where there is an error in the thing for which an individual bargains, by the general rules of contracting the contract is null, as in such a case the parties are supposed not to give their assent.

"The law on this subject is clearly stated in the case of Hitchcock v. Giddings (Daniel's Reports, 1), where it is said that a vendor is bound to know that he actually has that which he professes to sell."

In giving consideration to respondent's case under the laws of Honduras as found by the trial court and verdict of the jury, as it stands, on the subject-matter of the contract, attention is called to the case of CUBA RAILROAD COMPANY v. CROSBY, 222 U.S. 473, 32 S. Ct. 132, 56 L. Ed. 274:

"This is an action for the loss of a hand through a defect in machinery * * * The accident took place in Cuba, and no evidence was given as to the Cuban law, but the judge held that if that law was different from the lex fori, it was for the defendant to allege and prove it. * * * The court below went on the ground that, in the absence of evidence to the contrary, it would 'apply the law as it conceives it to be, according to its idea of right and justice; or, in other words, according to the law of the forum.' We regard this statement as too broad, and as having been wrongly applied to this case. It may be that, in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person, or conversion of goods courts would assume a liability to exist if nothing to the contrary appeared. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice but to

enforce an obligation that has been created by a different law. * * * With very rare exceptions *the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. That, and that alone, is the foundation of their rights.* * * * We repeat that *the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt, he must allege and prove it.* The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold. In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common-law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common-law territory for that where a different system prevails, obviously the limits must be narrower still. * * * *There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their*

affairs, and remitted them the place that established and would enforce their rights." (Petitioners' emphasis)

This opinion by Justice Holmes was preceded by his opinion in SLATER v. MEXICAN NATIONAL RAILROAD COMPANY, 194 U.S. 120, 24 S. Ct. Rep. 581, 48 L. Ed. 900, an action brought in Texas for wrongful death arising from injuries occurring in Mexico. Certain laws of Mexico giving rise to the cause of action were set up in the complaint, but there was no pleading as to applicable laws concerning the allowance of damages in regard to which there was a great dissimilarity in the laws of Mexico and the laws of Texas in that the recovery thereof in a lump sum, as allowed in Texas, was not authorized by Mexican law which provided for the payment thereof over a period of time on certain conditions.

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori,* with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of

his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In Northern P. R. Co. v. Babcock, 154 U.S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. Rep. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. * * *

"There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. * * * The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case."

Both of these decisions were recently before the Court of Appeals, Fifth Circuit, in the case of LIECHTI v. ROCHE, 198 Fed. 2d 174, and it is on the authority of such case that the Findings of Fact construing certain laws of the Republic of Honduras were made by the trial court in the present case.

We may concede for argument the construction placed upon such laws by the trial court.

By this means we then meet squarely the construction placed upon Article 1552 of the CIVIL CODE OF HONDURAS which requires that for a contract to be valid under the laws of Honduras it must contain *"consent of the parties, certainty of the object of the contract, the reason for the obligation, and consideration."* With attention directed to the jury's finding that there was not thirty million board feet of timber on the land known as La Soledad at the time the parties contracted, it requires little argument to show that these elements required in the making of a valid contract under Honduras law are wanting in the contract between the parties. It can hardly be said that there was any consent of the petitioners to the contract or reason for their obligation thereunder where *consideration and certainty of the object* of the contract were lacking.

The requirements made by this code provision for the validity of a contract under Honduras law are no different from like common law principles requiring object and consideration in a contract. So with this construction placed on such Article 1552 of the CIVIL CODE OF HONDURAS, requiring for the validity of a contract under Honduras law *consideration* and *certainty of object*, there is no basis in the record of the case for the judgment allowing a year's recovery on the minimum obligation of the contract in that such contract under the *verdict of the jury* never came into existence for the *want of consideration*.

There were other findings of the jury to the effect that there was no representation by respondent as to the quantity of timber it owned and that the petitioners failed to make a proper inspection thereof at the time of contracting with the respondent. But if such facts had the effect of altering respondent's position under the record of the case and

rendering the contract valid and subsisting under Honduras law, notwithstanding the requirements of such Article 1552 of the CIVIL CODE OF HONDURAS, requiring for the validity of a contract *consideration* and *certainty of object* in a contract, then the respondent had the burden of pleading and proving the law of Honduras in this further regard. This burden the respondent did not assume nor discharge in that it tried its case under common law principles, its pleading and proof as to the laws of Honduras being an afterthought, its proof coming on rebuttal and its pleading after verdict.

At the close of the evidence, in their motion to dismiss respondent's suit and in their motion for an instructed verdict the petitioners brought to the attention of the trial court that there was neither pleading nor proof of any law of the Republic of Honduras fixing the relief sought by the respondent. (R. 1194-1207). These motions were made on the conclusive proof that the contract between the parties, both as to their intention and the facts independent thereof, was a contract subject to the laws of Honduras, and the conclusive proof that there never did exist and the respondent did not own the quantity of timber contemplated by the contract and the petitioners' operations thereunder. The proof incidental to these motions was borne out by the verdict of the jury. It is submitted that the objections thus raised therein to respondent's case were not cured by its trial amendment and the findings of the trial court on the law of Honduras.

B.

Both the petitioners' pleadings and proof are to the effect that they cut 1,433,275 board feet of lumber, aside from some 325,000 board feet of ties they authorized one L.

Bush to cut, during their operations. (R. 33-34; 674-679). The respondent sought to establish that they had cut ten million board feet of lumber and in this regard called the witness Frix. (R. 9; 284-370; 381-563).

Frix was employed by respondent to make his calculations. There had been previous cutting of the timber prior to the petitioners' operations. At first Frix counted all of the stumps, both old and new, and was then instructed to make a further count of just the old stumps and make a subtraction in arriving at the stumps resulting from the petitioners' cutting. (R. 285; 366; 368-369).

In making his count in both instances Frix employed eight natives of Honduras. (R. 305).

The witness at first struck an average in fixing a guide to the timber cut in board feet. This was done by measuring the diameter of a number of various sized stumps and then the distance between the stumps and the tops of the trees where the latter had been cut off and left remaining. By this means he asserted he could then determine the average length of a tree on the basis of the size of the diameter of the stump, and require only a counting and measurement of the stumps. (R. 289-296). The guide that he thus worked out is shown on Pages 357 and 358 of the Record. The witness brought with him none of his original data on the basis of which this guide was prepared and could not in any one single example shown thereon verify the calculations by which it was made, as brought out exhaustively on cross-examination. In arriving at his average by which he was guided in the balance of the work by the natives he said he measured probably a thousand stumps. (R. 304).

With this average established, the natives, working in groups of two, would count and measure the stumps, one

making the count and measurement and calling it out to the other who would write it in a tablet book furnished for that purpose.

At the end of a day's work the natives would turn in to Frix the books reflecting the work they had done for that day and he would then enter their count and measurement in books which he was keeping. (R. 371-373; 409).

The witness supervised the work of the natives "fifty percent or more of the time", but even at those times the natives on occasions would "get so far down the ridges" that he could "neither see nor hear them." (R. 350; 415).

He was 71 years of age at the time of testifying. He was ill a part of the time the work was being done. (R. 302; 308; 981-984).

The work took about three weeks. One of the books used by the natives contained the date of November 12, 1950, and another the date of December 12, 1950. (R. 306; 416; 419-420). The witness testified that the work was done during the rainy season which is in "September, October, November and December and lasts probably over until in January. Some days it did not rain and sometimes it would rain at night and sometimes it would rain in the morning and sometimes there would come the afternoon showers. We were in the rainy season, and those are two of the rainy months, especially November. I remember that it was very ugly weather and it was very cold." (R. 430).

His testimony further shows that one man could have done the work "if he had sufficient time." The work was done in November and December, 1950. The case was tried in January, 1953. (R. 306; 420; 53).

This was the only time the witness ever tried to estimate timber on the basis of stumps and had never heard of it being done. (R. 562). He had with him in connection with his testimony a Doyle scale which is "accepted by the lumber industry as being correct by both the buyer and seller," but he had "never gone into the basis or the background of the Doyle scale." (R. 470). He was unable by use of this Doyle scale to verify any of the calculations shown on the guide or scale that he had prepared for determining in board feet the timber cut by the defendants. This is shown throughout his cross-examination.

On a voir dire examination the witness was questioned by the Court:

> "The Court: But there wasn't any way of your checking that work to see whether it was accurate or not, was there?
>
> "The Witness: Well, Judge, I am sorry to say, I simply had to rely on these fellows; there was no other way to do it.
>
> "The Court: But you could have checked to see whether they were doing it right?
>
> "Answer: Well, I didn't, no, sir." (R. 308).

Due objections were made to this testimony and the records introduced thereby on the ground that the same was hearsay and not the best evidence, which objections were overruled. (R. 298; 347; 356; 362; 370; 372-374).

Under this testimony it was shown that the first count of the stumps, both old and new, disclosed 9,966,942 board feet of lumber cut from the land, and the second count of the old stumps alone disclosed 646,713 board feet of lumber that had been cut. These figures were given in the testimony

of a witness who had tabulated the records Frix had prepared from the work of the natives. Objection thereto was overruled. (R. 375-380).

That the testimony of the witness Gordon T. Frix was hearsay is so held by the Supreme Court of Texas in the case of OLIVE & STIRNENBERG v. HESTER, 63 Tex. 190. In this case the appellee, Hester, as plaintiff, brought suit upon an account for value of timber delivered appellants under a verbal contract of purchase, alleging that appellants had purchased his timber at six dollars per thousand feet. The appellants answered in part that the contract was not as alleged by appellee in that the timber purchased was to be measured and scaled "by appellee or one Stewart."

> "The evidence is conflicting * * * as to whether the appellants had agreed to abide by the measurement which should be made by the appellee in person or by one Stewart.
>
> "The court * * * found that all * * * matters, except as to the persons by whose measurement the appellants agreed to abide and settle, was as claimed by the appellee.
>
> "In that respect, however, the court found as follows: 'The understanding and agreement at the time the contract was made was that the plaintiff or one Stewart was to measure or scale the logs, which was to be taken and accepted as the correct measurement. *The evidence shows that neither plaintiff nor Stewart measured all the logs, but that they were measured by employees of the plaintiff;* the evidence shows that the measurement was correctly reported to the defendants as made, and there is no evidence to show that the number of feet of logs reported was not measured and put into the creek as alleged by the plaintiff.'

"It appears from the statement of facts that *the measurement of the logs about which the controversy exists was made by employees of the appellee, and that of the correctness of their measurements he had no personal knowledge.* The appellee had a bookkeeper to whom the person who did make the measurements reported, and their reports were recorded by the bookkeeper, from which a report of the logs delivered was made to the appellants.

"On the trial *the appellee, for the purpose of showing the quantity of timber measured and delivered, testified that his employees, whose names he gave, measured the most of the timber,* of which statements were made monthly by him to appellants.

"This evidence was objected to, on the ground that, as to the measurements, the testimony was hearsay, and the objection was overruled.

"We are of the opinion that this was error. If the measurement had been made by the appellee or by Stewart, then, when reported as made by either of them, under the contract to settle by the measurement as made by either of them, the appellants would have been bound.

"There was, however, no agreement that the appellants would abide by measurements made by other persons than the appellee or Stewart; and the appellants were not bound by the reports of measurements made by employees, *it matters not how correctly their reports may have been entered in the book kept by the bookkeeper of the appellee for that purpose,* or how correctly such reports may have been copied and sent to the appellants.

"Such evidence was but hearsay and ought to have been excluded, *unless it was shown that the employees correctly measured and correctly reported their measurements.*" (Petitioners' emphasis)

Frix did not count any of the stumps. The parties counting these stumps and making the original records of the count that was made, from which Frix made his record, all of which records were introduced in evidence, were agents of the plaintiff, having been employed by Frix who was an employee of the plaintiff. The case of INSURANCE COMPANY OF NORTH AMERICA v. GUARDIOLA, 129 U.S. 642, 9 Sup. Ct. Rep. 425, 32 L. Ed. 802, is in point.

> "This was an action on a policy of insurance upon a cargo of sugar shipped at Sagua in Cuba for New York. * * *
>
> "The principal controversy at the trial was whether the cargo shipped consisted of 531 hogsheads or of 368 hogsheads only.
>
> "Upon this question there was much conflicting evidence, and the plaintiffs introduced a number of depositions, taken under commission at Sagua, including those of the plaintiffs themselves as to what took place at their warehouse, and those of their shipping agents as to what took place at the port some twenty miles below. Annexed to the deposition of one of the plaintiffs were letters written to them by their shipping agents, at the time of the successive shipments, stating the number of hogsheads shipped. Upon these letters being offered in evidence by the plaintiffs, the defendant objected that they were irrelevant and incompetent; and duly excepted to the ruling of the court admitting them.
>
> "It is too clear for discussion, that *these letters, written to the plaintiffs by their own agents, were no part of the transaction of shipping the sugar, but were mere reports by the agents to their principals,* and were incompetent, either in themselves, or in corroboration of the testimony of the agents, to prove the facts recited in the letters, against third persons. * * * *the letters to*

> *the plaintiffs from their own agents were absolutely incompetent,* and their admission in evidence clearly tended to prejudice the defendant with the jury." (Defendants' Italics).

Under this holding the records, made by the natives counting the stumps, irrespective of the records made therefrom by Frix, were no part of the transaction between the petitioners and the respondent under their contract; they were no more than mere reports by them as agents to the respondent as their principal. They were therefore "incompetent, either in themselves, or in corroboration of the testimony" of such parties, if they had themselves testified, and thus more so of the testimony of Frix and the records he made therefrom, "to prove the facts recited" therein against the petitioners.

By these authorities the testimony of Frix and the records introduced in evidence through his testimony is established as hearsay, and the question becomes one of whether such testimony and records were admissible under any exception to the hearsay rule.

In arguing the admissibility of this testimony the respondent cited the case of HAYDON v. BRANSON, 33 Idaho 368, 195 Pac. 545; MANUFACTURERS' NAT. BANK OF HOLLINGSWORTH & WHITNEY CO., 106 Me. 326, 76 Atl. 880; and MISSISSIPPI RIVER LOGGING CO. v. ROBSON, 69 Fed. 773, 16 C.C.A. 400. (R. 314-317; 325-337).

In admitting the testimony on the authority of these cases the Court stated: "I have been thinking about this matter a good deal; and I am not at all sure about the admissibility of this testimony, but in view of two of those decisions which were read I am going ahead and admit it,

and I am doing it with a good deal of doubt." (R. 346). (Petitioners' emphasis)

In HAYDON v. BRANSON, 33 Idaho 368, 195 Pac. 545, there would appear to be no question of hearsay as to calculations of the amount of timber cut by the use of a stump scale. The opinion indicates that efforts were made to discredit the testimony of the party making the scale, but the nature of such efforts are not set out. There are no indications that the party making such scale did not personally make the same or supervise the making of it.

In the case of MANUFACTURERS' NAT. BANK v. HOLLINGSWORTH & WHITNEY CO., 106 Me. 326, 76 Atl. 880, we have the following:

> " * * * Action of assumpsit on a contract arising out of a written acceptance by the defendant of an order given by J. S. Longley & Son for the payment to the plaintiff of such amounts as should become due them under their logging contract with the defendant. * * * J. S. Longley & Son entered into a written contract with the defendant to cut, haul and drive logs. * * * *They were to be scaled by a competent scaler mutually agreed upon.* * * * Did the defendant pay to the plaintiff all that became due under the contract with the Longleys for the logs hauled and driven? * * *
>
> "A. D. Heald was agreed upon as the scaler. * * * The plaintiff, however, claims that a much larger quantity of logs was hauled and driven than Mr. Heald's bills show, and much evidence was presented relative to that issue. * * *
>
> "Objection was made by the plaintiff to the admission of the scale pads, on the ground that Mr. Heald, the surveyor agreed upon by the parties, did not personally perform all the labor in making the scale of

the logs as represented on the pads, but that some of it was done by assistants who were not called to identify those pads made out by them and verify their correctness. * * *

"But we think the objection is without merit, and that upon reason and authority the pads were properly received in evidence. *They were original entries made by a person in the regular course of business whose duty it was to make them. They were made under conditions calculated to prevent mistakes and insure accuracy.* They were identified by Mr. Heald as those used in the work of scaling. The larger part of them he personally made out, and the rest were made under his direction, by his assistants, whose work he inspected and tested from time to time and adopted as his. * * *

"Neither can the plaintiff's contention be sustained that Mr. Heald's scale is to be disregarded, because other persons assisted him, and he did not personally perform all the work necessary to be done in making the scale. It would be quite impossible for one person to measure and survey each log in a lumbering operation amounting to several millions, especially when there were several landings at some distance apart. It was, therefore, to be expected that the surveyor for this large operation would require helpers and assistants, for the work to be done demanded it. Such, too, is the custom followed in the scaling of logs in large lumbering operations in this state. * * *

"The plaintiff further claims that Mr. Heald's scale did not give the full contents and quantity of the logs and for that reason it should not control. But in the absence of fraud or mathematical mistake *the scale of the scaler agreed upon by the parties is conclusive,* and the burden is upon the parties attacking it to prove such fraud or mistake." (Petitioners' emphasis)

Under the statutory laws of the State of Maine there is a provision for the selection by the towns of surveyors of

timber and logs, who are subject to fines and penalties for failure to perform their work. Chapter 88, Sections 149, 159, 161 and 162, REVISED STATUTES OF MAINE, 1944. Section 149 provides for their appointment; Sections 159 and 161 prescribes their duties; and Section 162 sets penalties for their failure to perform. In regard to these Statutes the Supreme Court of Maine in the case of Berry v. Reed, 53 Me. 487, wherein the parties had agreed upon the surveyor selected, has held as follows:

> "It is conceded that Palmer, who surveyed the logs and made out his survey bills indicating the quality of each of the particular qualities, was agreed upon by the parties to perform this service. What was the use or object of such an agreement, unless his decision, in the absence of fraud, was to bind the parties? Surveyors of logs, as appears by R. S., c. 41, Sec. 22, (now Chap. 88, Sec. 159) prescribing their duties, are to 'inspect, survey and measure all mill logs floated or brought to market, or offered for sale in their respective towns, and divide them into several classes, corresponding to the different quality of boards and other sawed lumber which may be manufactured therefrom; and they shall give certificates under their hands of the quantity and quality thereof to the person at whose request they are surveyed.' The word 'survey' means something more in the language of the lumber trade than a mere view and admeasurement. It includes a determination of the quality as well as the quantity of the timber or lumber surveyed; plainly not a conclusive determination, unless the parties agree upon the individual who shall make it; but when they do thus agree, in the absence of fraud and of stipulations to the contrary, it must be understood to mean that the judgment of the individual agreed upon shall bind the parties as to those matters embraced in the survey."

The case of MANUFACTURERS' NAT. BANK v. HOLLINGSWORTH & WHITNEY CO., supra, is therefore distinguishable in three important particulars. First, the statutory law of the State of Maine. Second, *the scaling of the logs was done during the actual cutting of the logs* and the reports of the scaler's assistants to him could come within what is generally referred to as the "Shopbook Rule", a well-established exception to the hearsay rule. Third, *the parties in the case had agreed upon the scaler* who made the scale or survey of the logs cut.

The case is therefore construing the agreement between the parties with reference to a scaling or surveying of the logs and holding that the parties to the contract evidently must have contemplated that helpers and assistants would be required by the surveyor agreed upon because of the size of the lumbering operation; and, as shown by the opinion and the case of BERRY v. REED, supra, the Courts of Maine have held that under the statutory laws of the State of Maine, when parties to a timber contract agree upon a surveyor for their operations the findings of such surveyor in the absence of fraud or mathematical mistake are conclusive and binding upon the parties.

The case of MISSISSIPPI RIVER LOGGING CO. v. ROBSON, 69 Fed. 773, 16 C.C.A. 400, is a case applying the "Shopbook Rule" to a timber and lumbering operation on the particular facts disclosed in the case:

> "The evidence shows that as the logs are cut in the woods they are scaled—that is, measured to ascertain their contents—by persons known as 'camp scalers,' and the measurements are entered upon cards. At the close of the day the measurements thus taken are entered upon the scale book. From time to time, inspec-

tors visit the camps, and verify the contents of the scale books by counting and remeasuring a sufficient portion of the logs to satisfy them of the correctness of the books. If errors are detected, the book is corrected. After verification and correction by the inspectors, the scale book is sent to the owner of the logs *and payment is made to the log cutters and handlers according to the contents of the book, which is thus made the evidence upon which the owner of the logs must make payment to his employes. It is clearly to the interest of the log owner that these scale books shall not show the cutting of any greater number of logs, than the facts will justify.* The mode by which the entries are made on the scale book is such as to assure accuracy therein. The parties who cut and haul the logs, and the owner, who is to pay for the cutting and hauling, act upon the contents of the books, and deem them to be proper evidence of the facts therein stated. *That which is received and acted upon by persons engaged in any line of business as competent evidence is ordinarily admissible when the same fact becomes a matter of inquiry in judicial proceedings.*" (Petitioners' emphasis)

The facts in such case justified an application of the "Shopbook Rule". But such facts as thus found in that case are not to be found in the present case. The records of the natives on which Frix based his measurements in board feet of the timber cut by the defendants were not made in the usual and ordinary course of business of either of the parties. They were made for this particular litigation.

When we consider that on the basis of the number of the sizes of the stumps determined by the various natives doing the original counting Frix, in arriving at his board feet measurement, then applied a scale and formula which he did not prepare and the mathematical working of which he could not verify in any of his lengthy examination, we are

one step further removed from rules applicable to the keeping of records in the usual and ordinary course of business and have hearsay compounded upon hearsay.

Applying these authorities to the facts in the present case it readily appears that the testimony of this witness was inadmissible because the same was hearsay and that it does not come within the bounds of any of the exceptions to the hearsay rule pointed out by any of the cases on which it was admitted. The case of HAYDON v. BRANSON, 33 Idaho 368, 195 Pac. 545, is authority only for the fact that it is possible to estimate timber based upon the measurement of stumps after trees have been cut. This may be admitted for all practical purposes in this case. There was no question in that case of hearsay evidence; so far as the opinion reflects the witness in question measured all of the stumps himself.

The measurement of the stumps and the calculation in board feet of the timber cut in this case did not occur during the process of the cutting, but occurred at a much later date.

None of the measurements were made in the regular course of business of either party. The parties did not agree upon Frix or his method of attempting to arrive at the amount of timber cut. *There was thus absent that incentive to see that the records were correct* as in the cases of MISSISSIPPI RIVER LOGGING CO. v. ROBSON, 69 Fed. 773, 16 C.C.A. 400, and MANUFACTURERS' NAT. BANK v. HOLLINGSWORTH & WHITNEY CO., 106 Me. 326, 76 Atl. 880.

The competency of the natives for the work they performed is not shown by any testimony. The witness testified that he tanght them how to scale the stumps and enter their results in approximately one day's time.

An effort was made during the trial of the case to ascertain the exact number of days worked by each of the natives and the number of stumps measured by such native on each of those days. It was impossible for the witness to give this information.

If it is assumed that work was performed in counting stumps on every day of the weeks required in the work, taking the number of hours which were worked each day by the natives under the testimony of the witness, and then taking into account the number of stumps purportedly measured as shown by the natives' books and the tabulation by the witness, it becomes apparent that the time elapsed in the measurement of each stump was approximately two minutes or less. When it is taken into account that during this period of time it was necessary to measure a stump, blaze or mark it, and move on to the next stump through very high grass, and over very rough terrain, as shown by the witness, it becomes apparent that it was impossible to measure each of the stumps.

It is to be further considered that the statements relied upon by the witness in giving his estimate as to the timber cut by the defendants were not only hearsay in so far as the witness himself was concerned, but the very statements in themselves were likewise hearsay because the witness testified that in making the measurements the man who actually made the measurements was not the man who made the entries which were turned over to the witness; rather the native who made the measurements called the same out to another native who actually made the entries and there is nothing in the record to show that the native who made the entries which were relied upon by the witness had any knowledge as to the accuracy of the measurements actually entered.

The testimony of the witness was further unworthy of belief because of the fact that he could not in any manner justify the guide or scale which he had prepared and which was used by him in arriving at the number of board feet of timber cut by the defendants. He testified that the scale commonly used in Honduras was the Doyle Scale but the witness exhibited a complete lack of familiarity with this scale and was only able to testify on the basis of a printed table or form of such scale which he exhibited in his testimony, and when it came to trees not included in such table he was at a loss and attempted to apply some method other than the Doyle Scale in arriving at the number of board feet in such a tree.

The testimony of the witness was therefore on general principles excluding hearsay inadmissible in that it was no more than mere hearsay and at that not even first hand hearsay.

> *"Hearsay evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."* Marshall, Ch. J., Mima Queen v. Hepburn, 7 U.S., Cranch, 290, 3 L. Ed. 348.

This testimony of the witness Frix is of utmost importance in the decision as rendered by the Court of Appeals.

For the record of this case does not support the Court of Appeals in its holding that:

> "Under the circumstances of this case, we are of the opinion that the court did not err in assuming from

> the evidence that there was more than the 6,000,000 board feet of lumber in the timber on the land and in rendering judgment against the defendants on their minimum obligation for the first year."

The amount of pine timber cut by the petitioners is fixed by the verdict of the jury at four million board feet. (R. 1211).

With this finding, any evidence offered in excess of four million board feet in fixing the timber cut by the petitioners is of no avail in any assumption as to the timber in existence at the time of the contract.

All of the evidence with reference to the amount of the timber falls within one of three categories: (1) the amount of timber in existence at the time the contract was made; (2) the amount of timber cut; and (3) the amount of timber left standing after the petitioners' operations.

No direct or affirmative evidence was offered by the respondent as to the timber in existence at the time the contract was made.

All of its evidence is of an indirect, inferential nature introduced in support of its proof as to the timber actually cut by the petitioners. Such is the testimony of the witness Frix, whereby in fixing the amount of timber cut, an inference is raised as to the amount of timber in existence when the contract was executed. (R. 284-298; 347-380; 548-556). Of a like character is evidence as to the capacity of the petitioners' mill and its normal operations, and the testimony found in respondent's cross-examination of petitioners' witnesses as to the timber being cut during their operations. (R. 934-935; 829-842).

All evidence of this nature, however, comes within the issue as to the amount of timber cut by the petitioners and is *foreclosed by the verdict,* which, to repeat, *fixed such amount at four million board feet.*

The respondent likewise offered no direct evidence as to the timber remaining after the petitioners ceased their operations.

The only direct evidence as to the timber in existence at the time the contract was executed, and at the time the petitioners ceased their operations, is found in the petitioners' case, in the testimony of the witness J. Ivy Beall. On direct examination Beall, familiar with the land known as La Soledad since 1926, fixed the timber in existence at the time of the sale to Ian Allen McNab, president of respondent company, at not more than from four to six million board feet. (R. 970; 975-976). The sale to McNab was one year prior to the sale to the petitioners. (R. 74-76; 949). On cross-examination this estimate of the witness was reduced to not more than four million board feet. (R. 1013-1014).

Beall's testimony alone will thus not support a finding *that there was more than six million board feet of lumber in the timber* at the time the contract was executed.

Under Beall's further testimony, at the time the petitioners ceased cutting there was *between a million and a quarter and a million and a half board feet of timber* remaining on the land. (R. 980).

With the amount of timber cut by the petitioners fixed *by the verdict at four million board feet,* and the timber remaining after they ceased cutting fixed at the most at a *million and a half board feet under Beall's testimony,* the only evidence in the record in this regard, there can be no

basis for any finding by the trial court that there was *more than six million board feet of lumber in the timber* at the time the parties contracted.

But in regard to the verdict fixing the timber cut by the petitioners at four million board feet the Court of Appeals has ruled that the judgment is in no way based on such finding.

> "If it be conceded that the testimony of Frix was inadmissible, it seems to us that the admission of such testimony was harmless. The jury apparently paid little or no attention to that testimony, because it found the approximate amount of timber cut from the land to contain 4,000,000 board feet, less than one-half of that testified to by Frix; and, even if the jury considered Frix's testimony in making their finding of 4,000,000 board feet, such finding did not enter into the calculations of the court and the judgment of the court is in no way based thereon, but is based on the minimum obligation of the contract for the first year of operations."

With this holding there remains in the record of the case only the testimony of Beall as to the timber in existence before and after the petitioners' operations and the petitioners' records as to the timber manufactured by them into lumber.

For, other than the inferences to be drawn from Frix's calculations reaching 9,320,229 board feet of lumber from a counting of old and new stumps (R. 380), the record is silent on any other evidence as to the timber existing before and after the petitioners' operations and the timber cut by the petitioners.

The petitioners' records disclosed that they had manufactured and sold 1,433,275 board feet of lumber. Beall's testimony fixed the remaining timber at not more than a million and a half board feet. The two figures together, without the verdict finding of four million board feet of timber cut by the petitioners, which the Court of Appeals has held did not enter into the calculations of the trial court in rendering judgment, will not support the judgment.

If the verdict finding of four million board feet of timber cut by the petitioners did not enter into the calculations of the trial court in rendering judgment then the testimony of Frix, of an inferential nature, could have no place therein. *For to disregard such finding, and yet regard the testimony on which such finding was made, would result in a trial before the court and deprive the petitioners of a trial by jury.*

If, as the Court of Appeals says, *"it be conceded that the testimony of Frix was inadmissible,"* then the trial court could not consider the same in rendering judgment; and, on the other hand, if such testimony of Frix was admissible, then the trial court is bound by the verdict in this regard, limiting such testimony to the finding of four million board feet of timber cut by the petitioners.

In either alternative the judgment cannot be supported on the evidence of the case.

If such testimony was inadmissible then the trial court could not assume therefrom that there was more than six million *"board feet of lumber in the timber on the land"* at the time the contract was executed and render judgment against the petitioners *"based on their minimum obligation for the first year"* of the contract.

Considering the other alternative, if the testimony of Frix was admissible, then it must be limited to the four million board feet of timber as set by the verdict, and be taken with Beall's testimony limiting the remaining timber to not more than a million and a half board feet. At the most, then, under the record of the case, *there was not more than five and a half million board feet of timber existing when the contract was made,* which fixes the petitioners' obligation on the timber manufactured into lumber and not on the timber alone and of itself.

The Court of Appeals has said that *"the defendants after ascertaining the shortage of timber, received most of what was available and thereby waived the condition that the entire contract be fully performed."* But it does not follow that the petitioners thereby became liable under the contract to pay for something that never existed. *The only liability which the petitioners would have incurred under such circumstances would be to pay for what had actually been received.* This is the holding of the authorities cited to the text of 46 AM. JUR., Sales, Sec. 220, which the Court of Appeals cited.

In support of the approval given the trial court's assumption the Court of Appeals has stated:

> "The plaintiff corporation waived any right it might have to recover for the second year, because it stated the proof was not clear as to the amount of timber which remained for cutting during the second year. It does not appear that the defendants urged as a defense that the timber on the land contained less than the 6,000,000 board feet of lumber, the minimum which the partnership was obligated to cut during the first year, and which was the basis of the judgment in this case. No issue was submitted to the jury on this point."

Attention is called to the respondent's pleadings. *"In alleging a cause of action and seeking a recovery thereon the plaintiff in its pleadings adhered strictly to the contract in all its terms and provisions; and sought no recovery other than a recovery that could be had under the express written contract between the parties."*

The importance of the respondent's pleadings in this regard cannot be over-emphasized.

In Paragraphs XXIV and XXV of its First Amended Original Petition on which it went to trial, the respondent, as plaintiff, alleged:

> "That after said contract had been abandoned by defendants and after defendants had completely removed from the premises much of the subject matter of the contract was destroyed by forest fires. That plaintiff is seeking to minimize its damage as prayed for in its original petition herein and has contracted with a third party to convert into lumber the timber remaining on the land which was left thereon after the abandonment of the contract by defendants and after destruction of much of the subject matter of the contract by forest fires." (R. 10).

The respondent thus went into the trial of the case seeking to prove the whole of the contract, with the exception of such timber as had been destroyed by *forest fires* or had been *contracted with a third party* for cutting by way of a minimization of its damages after the petitioners had ceased their operations, notwithstanding that it sought recovery of only two years' of the minimum obligation. *Such minimum obligation was sought as a part of the whole contract and not on any theory of a severable contract,* should a shortage of timber as called for by the contract develop,

which might otherwise be found within the terms of the contract or the conduct of the parties in acting thereon.

With the respondent thus seeking, as its pleadings thoroughly disclose, a recovery of two years' of the petitioners' minimum obligation on the whole of the contract, the petitioners were required to meet the issue as thus drawn.

The contract was for a term of five years. The petitioners were obligated to cut or pay for a minimum of six million board feet of lumber a year, thus a minimum of thirty million board feet of lumber for the whole of the contract.

It is thus that Special Issue No. 6 was submitted to the jury as to whether there was or was not thirty million board feet of standing pine timber on La Soledad immediately prior to the execution of the contract, to which the jury answered, *"there was not."* (R. 1213). This issue was in accordance with the respondent's pleading of its case, the respondent at no time in the trial taking the position that there was less timber on La Soledad at the time the parties contracted than that called for by the contract. The petitioners therefore met the burden placed upon them by the respondent's pleadings as they were at the time of the trial and as they remained throughout the trial.

But if this issue as submitted the jury did not sufficiently call into question the element of consideration and subject-matter of the contract, *sufficient even as to the first year of the contract*, the basis of the judgment as affirmed by the Court of Appeals in the language of the opinion as hereinabove quoted, the petitioners' requested issue (Specially Requested Issue No. 11) reading: *"Do you find from a preponderance of the evidence that the performance by Daniel Lumber Company of the contract made with Em-*

presas Hondurenas was rendered impossible because Empresas Hondurenas did not own the amount of pine timber contemplated by the contract," should have been submitted, the submission of which was refused by the trial court and not in any way passed upon or discussed in the opinion of the Court of Appeals. (R. 1209).

The respondent's suit was for an accounting on the timber actually cut by the petitioners, and, subject to such accounting, for a recovery of two years' of the petitioners minimum obligation under the contract. (R. 2-11).

With the respondent waiving any right to recover for the second year of the contract on its own admission that the evidence would not support a judgment therefor because of the lack of timber sufficient for such second year, *and the evidence when taken with the verdict of the jury showing positively that there was not sufficient timber for the first year,* the respondent is left only with the plea for an accounting on the timber cut by the petitioners which the jury fixed at four million board feet.

On this phase of the case there remains only the question of whether the testimony of Frix was inadmissible as hearsay, *which, if inadmissible, the Court of Appeals has ruled was harmless.* If such testimony was not hearsay then the respondent is limited to a recovery for four million board feet. Under the minimum payment provisions of the contract (and there was no evidence offered by the respondent whereby such amount of timber could be figured otherwise) this would be $24,000, of which amount the petitioners had paid $15,000 at the time the contract was executed. This would leave a balance due by petitioners of $9,000. On the other hand, if such testimony was hearsay then the respondent, under the case as now of record, is not entitled to any recovery as the petitioners initial pay-

ment of $15,000 amply covered the amount of timber cut by them according to their records, the only remaining evidence in the case on the accounting plea.

Conclusion

For the reasons assigned, petitioners respectfully submit that in view of the errors on the trial of this cause as affirmed by the Court of Appeals a writ of certiorari should be granted, and petitioners pray for the issuance of such writ to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BENNETT B. PATTERSON,
510 Citizens State Bank Building,
Houston 2, Texas
Attorney for Petitioners

Certificate of Service

I, Bennett B. Patterson, attorney for Daniel Lumber Company, J. W. Daniel, Charles H. Daniel and R. W. Daniel, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of December, 1954, I served three copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States on Empresas Hondurenas, S. A., Respondent, by mailing such copies in a duly addressed envelope by registered mail, return receipt requested, postage prepaid, to J. D. Wheeler and Richard T. Davis (Boyle, Wheeler, Gresham & Davis), attorneys for Respondent, at their mailing address of 1603 Alamo National Building, San Antonio 5, Texas.

This the _____ day of December, 1954.

BENNETT B. PATTERSON,
510 Citizens State Bank Building,
Houston 2, Texas
Attorney for Petitioners